

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA L. GARCIA)	
Claimant)	
)	
VS.)	
)	
AIRPORT PLAZA HOTEL)	
SUPER 8 MOTEL)	
Respondents)	Docket No. 1,000,383
)	
AND)	
)	
CONTINENTAL CASUALTY CO.)	
WAUSAU UNDERWRITERS INS. CO.)	
Insurance Carriers)	

ORDER

Respondent, Airport Plaza Hotel, and its insurance carrier, Continental Casualty Company, request review of a preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on August 22, 2002.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's accidental injuries arose out of and in the course of her employment with both respondents. The ALJ designated Dr. Steven J. Howell as claimant's treating physician and ordered the medical and temporary total disability compensation to be paid one half by Continental Casualty Company and one half by Wausau Underwriters Insurance Company.

Respondent, Airport Plaza Hotel, and its insurance carrier, Continental Casualty Company, argue the claimant suffered an intervening accidental injury arising out of and in the course of her employment with a subsequent employer.

Respondents, Airport Plaza Hotel and Super 8 Motel and their insurance carrier Wausau Underwriters Insurance Company, argue the preliminary hearing Order is not subject to review because respondent, Airport Plaza Hotel and its insurance carrier, Continental Casualty Company, did not raise a jurisdictional issue subject to review pursuant to K.S.A. 44-534a. In the alternative, it is argued the ALJ's decision apportioning payment of medical and temporary total disability compensation between the respondents should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant began employment with Airport Plaza Hotel in 1996 working in the laundry room. Claimant stood on a concrete floor and folded as well as separated sheets and towels. She began to experience pain in her feet in approximately February 1999.

The claimant noted the pain in her feet worsened to the point that by the end of the workday both of her feet would be swollen and she could barely walk. The claimant sought treatment with her primary care physician and was ultimately diagnosed with a congenital condition described as bilateral middle facet tarsal coalitions of her feet. Claimant was referred to Dr. Howell for further treatment.

Dr. Howell prescribed orthotics which provided some relief but at her appointment with the doctor on June 19, 2001, the claimant had reached the point where she was unable to stand on her feet for the whole day. Dr. Howell recommended a surgical subtalar fusion but claimant wanted time to think about whether to proceed with the surgery.

While receiving treatment the claimant continued working for respondent, Airport Plaza Hotel, and because of her complaints about the pain in her feet, she was provided a bench to kneel on while working in order to get off her feet. Claimant's employment with Airport Plaza Hotel was terminated on October 7, 2001. She was told she was no longer needed because of a downturn in business following the tragedy that occurred on September 11, 2001.

While claimant was unemployed the condition of her feet improved. In a letter dated November 7, 2001, Dr. Howell opined that any job where claimant was on her feet would aggravate the subtalar joint and claimant's condition but he could not offer an opinion whether such aggravation was permanent. On December 5, 2001, claimant was examined by Dr. Pedro A. Murati at her attorney's request. Dr. Murati diagnosed bilateral subtalar arthritis which he attributed to each and every workday from February 1999 through October 7, 2001. The doctor provided a 12 percent whole person impairment rating.

Claimant obtained employment as a housekeeper with respondent, Super 8 Motel, in February 2002. Claimant was on her feet during the workday and her feet again began to hurt and swell. On March 12, 2002, claimant returned to see Dr. Howell and noted the pain in her feet worsened with activity. Dr. Howell again recommended surgery. In a letter dated March 14, 2002, Dr. Howell agreed that although claimant's condition was congenital, it was nonetheless permanently aggravated by her work. In a letter dated March 26, 2002, Dr. Howell noted that claimant's employment aggravated her congenital deformities but there was no worsening of her problems from June to October 2001.

Claimant testified:

Q. [Mr. Anderson] My understanding is you left Airport Plaza, you said, in October of 2001 because of the event of September 11th; correct?

A. [Claimant] Yes.

Q. And your feet improved while you were off work, is that correct?

A. Yes.

Q. But then when you went back to work in February of 2001 [sic] for Super 8 Motel your feet started getting worse, is that correct?

A. Yes.

Q. And they got worse through the last day you worked at Super 8 Motel in June of 2002, is that correct?

A. Yes.

Q. And your job at Super 8 Motel, as I understood it, was to clean rooms, to make the beds, to vacuum, to clean the bathrooms, and to resupply the carts; correct?

A. Yes.

Q. And this required you to be on your feet all day, correct?

A. Yes.

Q. And by the last day that your worked at Super 8 Motel the condition of your feet was worse than it had ever been before, correct?

A. Yes.¹

Claimant's employment with respondent Super 8 Motel was terminated June 5, 2002.

Initially, respondents, Airport Plaza Hotel and Super 8 Motel, and their insurance carrier, Wausau Underwriters Insurance Company, argue the Board does not have jurisdiction to entertain review from this preliminary hearing.

An ALJ's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.² "A finding with regard to a disputed issue of whether the

¹ P.H. Trans. at 27-28.

² K.S.A. 44-551(b)(2)(A).

employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."³ Whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of his prior employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

Respondent, Airport Plaza Hotel, and its insurance carrier, Continental Casualty Company, argue claimant suffered a new intervening accident which is the cause of her current need for medical treatment.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity at Super 8 Motel aggravated, accelerated or intensified the underlying disease or affliction.⁴

The evidence establishes that claimant suffered an aggravation of her preexisting congenital condition during her employment with respondent, Airport Plaza Hotel. Medical treatment was provided and a surgical procedure was recommended but not pursued. After her termination of employment with respondent, Airport Plaza Hotel, the condition of claimant's feet improved while she was unemployed. Dr. Murati provided an impairment rating.

The claimant then became re-employed and the condition of her feet again became painful. Claimant noted the condition of her feet was worse than it had ever been before. Although Dr. Howell had not attributed any permanent aggravation of claimant's condition to her employment while she worked for Airport Plaza Hotel, by March 2002, while claimant was employed by Super 8 Motel, the doctor agreed claimant's work activities permanently aggravated her preexisting congenital condition.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁵ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced

³ K.S.A. 44-534a(a)(2).

⁴ See *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

⁵ *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

by an independent intervening cause.⁶ The Board finds that claimant's work at Super 8 Motel was the cause of claimant's condition at the time of the preliminary hearing. Claimant's condition, which had subsided before her employment with Super 8 Motel, therefore, is compensable as an aggravation of her preexisting congenital condition.

Airport Plaza Hotel should not be held liable for claimant's medical treatment after her employment with Super 8 Motel, when claimant said her condition worsened more than it had been at its preemployment level. But, during the time claimant was working at Airport Plaza Hotel, that respondent and its insurance carrier could be responsible for medical treatment for the aggravation that occurred as a result of claimant's employment with Airport Plaza Hotel. Nevertheless, since the ALJ's Order in this case is prospective and deals only with medical treatment from the date of the preliminary hearing Order, the assessment of expenses for medical and temporary total disability compensation should be assessed against Super 8 Motel and its insurance carrier, Wausau Underwriters Insurance Company.

Accordingly, respondent, Super 8 Motel, and its insurance carrier, Wausau Underwriters Insurance Company, should be liable for claimant's medical and temporary total disability compensation. The ALJ's Order is modified in accordance with the foregoing and affirmed in all other respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of ALJ Nelsonna Potts Barnes on August 22, 2002, is modified to assess medical and temporary total disability compensation benefits against respondent, Super 8 Motel, and its insurance carrier, Wausau Underwriters Insurance Company.

IT IS SO ORDERED.

Dated this _____ day of December 2002.

BOARD MEMBER

c: James Roth, Attorney for Claimant
Anton Andersen, Attorney for Airport Plaza Hotel
Douglas Hobbs, Attorney for Super 8 Motel
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation

⁶ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973). See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1082 (1996).